No. 12,030

In the United States Court of Appeals for the Ninth Circuit

EWELL TOOBERT, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF OF APPELLEE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal by one of the defendants below from a final judgment of the District Court of the United States for the Southern District of California, Central Division, awarding restitution of rent overcharges collected in violation of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. Sec. 901, et seq.), the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. Sec. 1881, et seq.), and of the regulations issued pursuant thereto, the Rent Regulation for Housing (10 F. R. 13528) and the Controlled Housing Rent Regulation (12 F. R. 4331), respectively, in an action for restitution and other injunctive relief brought by the Housing Ex-

pediter pursuant to Section 205 (a) of the 1942 Act, as amended, and Section 206 (b) of the 1947 Act, as amended.

The material facts in the case are not in dispute. From June 2, 1945, until September 5, 1947, appellant was the owner of the premises located at 422, 422¼, 422¾, and 424 East 15th St., Los Angeles, California, in the Los Angeles Defense-Rental Area (R. 120). As such, the premises were subject until July 1, 1947, to the Rent Regulation for Housing issued under the 1942 Act and from July 1, 1947, to the Controlled Housing Rent Regulation issued under the 1947 Act.

Plaintiff charged that defendants Toobert, Hammond, and Hall had demanded and collected rents in connection with five of the housing accommodations at the particular premises in excess of the legal maximum rents in effect for the accommodations. A schedule of the tenants, the periods of their occupancy, the particular units, the maximum legal rents for the units, the excessive rents actually collected and the total amount of the overcharges was set forth in the complaint (R. 7). In his answer (R. 8), defendant Toobert denied the overcharges and further pleaded that the illegal rents, if any, had been collected prior to the one-year statute of limitations contained in Section 205 (e) of the 1942 Act.

At the trial all the overcharges as alleged were established by the testimony of the tenants (R. 49–104) and the collection of excessive sums from the tenants was not denied by defendants. Defendant Hammond's defense was that all of the monies collected by him from the tenants in excess of the maximum

legal rents were collected for the purpose of making necessary repairs and to pay utility charges pursuant to separate agreements with each tenant (R. 105–112). The tenants denied the existence of such agreements (R. 150–156) and plaintiff established in evidence by the official registration statements for the five units that the maximum legal rents for the units included the landlord's obligation to make interior and exterior repairs as well as to pay the utility charges (R. 110, 111). Defendant Toobert's defense was that he was not at any time during the period of the overcharges the landlord of the particular accommodations as a result of two successive agreements entered into by him and Hammond. Toobert testified that some time in July 1945 (R. 129, 130, 136) he entered into an oral contract of sale with Hammond for the premises for the sum of $17,500 with no down payment but calling for monthly payments of $150.00 (R. 130, 131, 134); that the agreement was in effect for approximately one year during which Toobert was paid $150.00 per month by Hammond (R. 131); that upon the termination of the oral contract of sale, a second arrangement was entered into by the same defendants consisting of an oral lease of the same premises at a monthly rent of $125.00 which Toobert received each month from Hammond (R. 130, 131, 137); and that on September 5, 1947, Toobert disposed of the properties by sale to the Realty Investment Corporation (R. 132).

At the conclusion of the trial, the District Court stated its opinion as follows:

(a) That the one-year statute of limitations set forth in Section 205 (e) of the 1942 Act did not

apply to an action for restitution brought under Section 205 (a) of the 1942 Act (R. 158, 159);

(b) That the evidence indisputably established all of the overcharges as alleged by plaintiff (R. 160);

(c) That the oral contract of sale between Toobert and Hammond was void from its inception (R. 160, 161);

(d) That during the existence of the void contract of sale both Toobert and Hammond improved the properties jointly, worked together in the collection of the illegal rents, and exercised control in the operation of the premises (R. 161, 162);

(e) That the obligation to repair the premises was included in the maximum legal rents for the premises and to charge the tenant therefor was illegal and constituted overcharges (R. 161, 162); and

(f) That defendants Toobert and Hammond were both jointly liable for the overcharges collected until September 1947, the date when Toobert leased the premises to Hammond, and that Hammond was solely liable for the overcharges collected thereafter (R. 162).

The foregoing was incorporated into findings of fact, conclusions of law (R. 23), and into the lower Court's judgment (R. 31).

In this appeal appellant Toobert does not assign as error any of the District Court's findings as to the overcharges, but appellant admits that "The evidence establishes without contradiction * * * and there is not before this court any controversy as to: (a) the maximum rents on the five units in question; or (b) the amounts paid by the tenant-occupants of these

five units in excess of the maximum rents, as set forth in the judgment [Tr. p. 32] and totalling $2,208.00'' (Appellant's Br., pp. 2, 3). Appellant complains only of those findings of the lower Court holding appellant to be the landlord of the premises (Appellant's Br., p. 5).

ARGUMENT

Contrary to appellant's contention, the lower court did not err in finding that defendants Toobert and Hammond were the landlords of the particular premises from July 13, 1945, through September 1, 1947, and, as landlords, demanded and received illegal rents

Appellant does not raise in this appeal any questions as to the propriety of the lower Court's findings of all of the overcharges as alleged by plaintiff, but freely admits their existence and establishment in the evidence (Appellant's Br., pp. 2, 3). Appellant does attack Findings of Fact 5, 7, 9–11, and 13–17 of the District Court insofar as they find that he was the landlord of the particular premises, together with defendant Hammond, during the period from July 13, 1945, through September 1, 1947, and participated in the collection of the admitted overcharges (Appellant's Br., p. 5). It is submitted that these findings are amply supported by the evidence in the case.

Before considering this evidence, the provisions enacted by the Congress in the 1942 and 1947 Acts, as well as those utilized by the Housing Expediter in the regulations effectuating the provisions of the two Acts, which establish and define the violations and the liabilities therefor, will be briefly discussed. These provisions are of the broadest scope, defining viola-

tions and liabilities in terms of *any person* who participates in their commission.

Section 205 (e) of the 1942 Act[1] phrases liability for statutory damages in terms of *any person* who demands or receives over-ceiling rents (*infra,* p. 14). Section 4 (a) of the 1942 Act does likewise.[2]

The identical approach is also used in the Regulation. Section 2 (a) of the Rent Regulation provides that "* * * *no person* shall demand or receive any rent for use or occupancy * * * of any housing accommodations * * * higher than the maximum rents provided by this regulation; and *no person* shall offer, solicit, attempt or agree to do any of the foregoing." [Italics ours.] (*Infra,* p. 15.)

In addition, the definition of "landlord," as contained in Section 13 (a) (8) of the Regulation is in complete harmony with the provisions of the Act and Regulation set forth above. "Landlord" is de-

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[1] Section 205 (e) may be paraphrased to read as follows:

"If *any person* who receives rent for defense-area housing accommodations violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who pays rent for such defense-area housing accommodations * * * may * * * bring an action * * *, etc. Where an action is not brought within thirty days, the Administrator may do so on behalf of the United States." [Italics ours.]

[2] "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for *any person* * * * to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing." [Italics ours.]

fined to include an "*owner,* lessor, sublessor, assignee" and any "*other person receiving* or entitled to receive rent" or "an agent" of any of the foregoing. [Italics ours.] (*Infra,* p. 16.) So that under the Act and Regulation, the term "landlord" means "*any person receiving rent.*"[3] As the Court of Appeals for the Fifth Circuit recently stated in the as yet unreported case of *Woods* v. *Willis,* No. 12356, decided December 31, 1948:

> As to the excepted overcharge, the appellee is liable on two grounds: (1) He is the "landlord" of premises within the meaning of the aforesaid act and regulations; and (2) he is liable *as a "person" who received* rent within the meaning of said act and regulations. [Italics ours.]

By its consistent use of the term "person" in Sections 4 (a), 205 (a), and 205 (e)[4] of the Act (*infra,* p. 14), Congress endeavored to make effective its expressed intent of preventing inflation by controlling rents. The term as used in the Act and in Sections 2 (a), 10, and 13 (a) (8) of the Rent Regulation is of the broadest scope. It describes those who receive rent in connection with the use of housing accommodations, whether they be owners, lessors, brokers, sublessors, strangers, or agents of any of the foregoing. Under the Act and Regulation it is the receipt of the illegal rent which constitutes the volation, irrespective of any other relationship the receiver may enjoy. This approach, utilized by the

[3] The same is true under the Housing and Rent Act of 1947. (See Appendix, *infra,* p. 16.)

[4] Likewise in Section 205 (b) of the Act (Appendix, *infra,* p. 13).

Congress in the Act and by the Housing Expediter in the Regulation, very practically recognizes that it is the payment and receipt of excessive rents that is inflationary, not the identity of the person who receives the over-ceiling rents. Hence, the employment of the unrestricted term "any person" in defining the violation (See too: *Bowles* v. *Ruppel,* 157 F. 2d 263 (C. C. A. 3).) "The 'seller' is individually liable for the overcharges he collects" (*Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9), certiorari denied, 330 U. S. 848).

Turning now to the evidence in the case, it is clear that appellant at least shared in the receipt of the admitted overcharges collected by Hammond during the crucial period from July 13, 1945, through September 1, 1947, to the extent first of $150.00 per month until approximately July 1946 and thereafter to the extent of $125.00 per month until September 1947. That this $150.00 monthly payment comprised part of the illegal rents collected by Hammond is shown by his testimony, as follows (at p. 104):

> Q. Mr. Hammond, you have heard the testimony of the various witnesses that preceded you on the stand to the effect that they paid you rent on a number of occasions. After they paid you the rent what did you do with it?
>
> A. Well, I took $18.00 of it and gave it to Mr. Toobert each month, and the other $22.00 I put it aside until I had gotten enough to fix up those houses that wasn't in no living condition when I taken them over from Mr. Toobert.
>
> The COURT. I can't understand. Speak louder, please.

A. Yes, sir. I taken the $18.00 of the money that they gave me and paid Mr. Toobert.

The COURT. Mr. Toobert?

The WITNESS. Yes, sir. * * *

In view of the foregoing testimony, it is of no significance, as appellant alleges (Appellant's Br., p. 16), that these payments of $150.00 out of the illegal rents collected took the form of a flat sum.

The fact that the $150.00 payments were paid to Toobert by Hammond from the illegal rents collected for the particular premises by the latter is of particular significance because the alleged oral contract of sale under which the payments were ostensibly made was found by the District Court to be void from the start (R. 160).[5] This finding is in accord with the well-settled law in California that an oral contract for the sale of realty is void (*Dondero* v. *Aparicio,* 63 Cal. App. 373, 218 Pac. 608; *Craig* v. *Zelian,* 137 Cal. 105, 69 Pac. 853; *Paul* v. *Layne and Bowler Corp.,* 9 Cal. 2d 561, 71 Pac. 2d 817; Subsection 4 of Section 1624, Cal. Civil Code).

Inasmuch as the alleged oral contract of sale was void from the start, appellant Toobert's status with respect to the properties and his relation to Hammond and the tenants must be ascertained from his conduct as established by the evidence in the case. After

[5] The circumstances surrounding the alleged contract were, to say the least, unusual. Although the alleged sale price was $17,500, contrary to customary business practice for realty of far lesser value, no down payment was required (R. 130). No receipts were given by Toobert to Hammond for the $150.00 monthly payments (R. 150). Moreover, defendant Hammond did not even appear to be sure that he was buying the properties (R. 119, 120).

weighing all of the evidence, the District Judge found that during the period from July 13, 1945, through September 1, 1947, appellant Toobert and defendant Hammond were landlords within the unrestricted language of the regulations under which *any person* who participates in the receipt of illegal rents is defined as a landlord. That evidence is briefly summarized as follows:

(a) During the period in question, appellant Toobert was admittedly the legal owner of the premises (R. 120);

(b) Hammond initially paid Toobert $150.00 and later $125.00 per month out of the illegal rents collected by the former for the premises (R. 104, 105);

(c) Toobert gave Hammond no receipts for the $150.00 monthly payments (R. 135, 136);

(d) Toobert knew of the overcharges (R. 73, 89, 102);

(e) Toobert visited and examined the premises during the period in question and promised the tenants to make repairs (R. 78, 80, 89, 90);

(f) Part of the illegal rents collected by Hammond was turned over to Toobert and all of the remainder was turned back into the properties in the form of repairs and improvements (R. 107, 108);

(g) Toobert was the sole beneficiary of the full amount of the overcharges, part of which he received in the form of monthly payments of $150.00 or $125.00 and the remainder of which was received in the form of repairs and improvements to the premises (R. 107–108).

It is submitted that the foregoing evidence clearly warranted the findings of the District Court that

Toobert, together with Hammond, were the landlords of the particular accommodations and participated in the collection of the illegal rents.

Nor is there any merit to appellant's contention (Appellant's Br., pp. 21, 22) that the judgment of the lower Court, insofar as it imposes upon him a several responsibility to restore to the tenants certain of the overcharges collected (R. 32), is contrary to the equitable principle of unjust enrichment upon which restitution under Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act is based. Appellant contends that he was enriched only by the receipt of $150.00 monthly and later by the receipt of $125.00 monthly, neither of which sums has been established by plaintiff to exceed the aggregate maximum rentals on the seven apartments in the particular premises (Appellant's Br., p. 22). The latter contention is wholly irrelevant. The complaint alleges overcharges, and the District Court found such overcharges, only with respect to five of the units in the particular premises. The fact that there is a total of seven or seventeen units in the premises is immaterial. The maximum rents as well as the overcharges on these five units are admitted by appellant and are not questioned by him in this appeal (Appellant's Br., pp. 2, 3). Moreover, the uncontradicted evidence of defendant Hammond establishes that after he made his monthly payments to Toobert, out of the illegal rents collected, all of the funds that remained were turned back into the property in the form of repairs and improvements (R. 107, 108). The net result of these transactions was that Toobert re-

ceived all of the overcharges, either directly, in specie, or indirectly, through improvements and consequent enhancement of the value of the property.

As to the sufficiency of the evidence in the case to support the lower Court's findings and judgment, the language of this Court expressed in the case of *Coffin-Redington Co.* v. *Porter,* 156 F. 2d 113 is particularly applicable. In that case this Court stated as follows:

> The trial court observed their conduct and demeanor while on the stand, and was in a better position than we are to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. *Columbian Life Insurance Co.* v. *A. Quandt & Sons,* 9 Cir., 154 F. 2d 1006.

To the same effect, see: *Lowery* v. *United States,* 156 F. 2d 153 (C. C. A. 9); *Augustine* v. *Bowles,* 149 F. 2d 93 (C. C. A. 9); *Barnes* v. *Bowles,* 157 F. 2d 790 (C. C. A. 5).

CONCLUSION

The judgment below is correct in all respects and should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS

1. Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. sec. 901, et seq.):

> SEC. 4 (*a*). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 206 * * * or to offer, solicit, attempt, or agree to do, any of the foregoing.
>
> SEC. 205 (a.) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.
>
> SEC. 205 (b). Any person who willfully violates any provision of section 4 of this Act, and

any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the persons who by such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

2. Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. sec. 1881, et seq.):

SEC. 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

3. Rent Regulation for Housing (10 F. R. 13528):

SEC. 2. *Prohibition againgst higher than maximum rents*—(a) *General prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on

and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SEC. 13. *Definitions.* (a) When used in this regulation the term:

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

3. Controlled Housing Rent Regulation (12 F. R. 4331):

SECTION 1. *Definitions and scope of this regulation.*

"Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

SEC. 2. *Prohibition against higher than maximum rents.*—(a) *General prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing.

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